(1) Supreme Court, U.S.
FILED

991405 FEB 22 2000

OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

NICHOLAS KUHN,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition for Writ of Certiorari to the
Appellate Court of Illinois,
First Judicial District

PETITION FOR WRIT OF CERTIORARI

FREDERICK F. COHN
601 S. LaSalle St.
Suite 700
Chicago, IL 60605
(312) 641-0692
Attorney for Petitioner

DENNIS DOHERTY
601 S. LaSalle St.
Suite 700
Chicago, IL 60605
(312) 580-0935
Of Counsel

46 pp

QUESTIONS PRESENTED

1. Was defendant denied his constitutional right to confront his accuser by the trial court's unreasonable refusal to allow cross-examination of a sexual assault complainant, relative to high school yearbook entries she made on the day in question, which entries would have obviously corroborated defendant's consent defense, and about which defendant had a clear right to cross-examine? and

2. Was permitting a later stipulation to the admission of this document, a constitutionally permissible substitute for cross-examination?

PARTIES INVOLVED

Petitioner, Nicholas Kuhn, was the defendant in the Circuit Court of Cook County, Illinois; the Appellant in the Appellate Court of Illinois; and the Petitioner in the Illinois Supreme Court.

Respondent, People of the State of Illinois, was the Plaintiff in the Circuit Court of Cook County; the Appellee in the Appellate Court of Illinois; and the Respondent in the Illinois Supreme Court.

TABLE OF CONTENTS

Page

Questions Presented..... i

Parties Involved..... ii

Table of Contents..... iii

Table of Authorities Cited..... v

Prayer for Certiorari..... 1

Opinions and Orders Below..... 1

Jurisdictional Statement..... 1

Constitutional Provisions Involved.... 2

Statement of the Case..... 2

Statement of Facts..... 2

Raising the Federal Question..... 5

Reasons for Granting Certiorari..... 6

1. Certiorari should be allowed to review the judgment below, because defendant was denied his right of confrontation. Permitting a later stipulation to the admission of a document is not a constitutionally permissible substitute for cross-examination..... 6

Conclusion..... 7

APPENDICES:

App. A - Order of the Appellate Court of Illinois, First Judicial District, No. 1-98-0178, August 16, 1999..... App. 1

App. B - Order of the Supreme Court of Illinois, No. 88272, denying petition for leave to appeal, December 1, 1999..... App. 32

TABLE OF AUTHORITIES CITED

Page

Cases

Coy v. Iowa, 487 U.S. 1012, 1016-17 (1988)..... 7

Pointer v. Texas, 380 U.S. 400, 407 (1965)..... 6

Constitutional Provisions

The Confrontation Clause of the Sixth Amendment to the United States Constitution..... *passim*

The Due Process Clause of the Fourteenth Amendment to the United States Constitution.. *passim*

Other Authority

5 WIGMORE, EVIDENCE § 1367, at 32 (Chadbourn rev. 1974)..... 6

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

Petitioner, Nicholas Kuhn, prays that a writ of certiorari issue to the Appellate Court of Illinois, First Judicial District, to review its judgment affirming the judgment of conviction and sentence for criminal sexual assault and attempt criminal sexual assault.

Opinions and Orders Below

The judgment ("Summary Order") of the Appellate Court of Illinois, First Judicial District, No. 1-98-0178, dated August 16, 1999, affirming defendant's convictions for criminal sexual assault and attempt criminal sexual assault - unreported - is set out at App. A, pp. App. 1-31.

The Order of the Illinois Supreme Court, No. 88272, dated December 1, 1999, denying petition for leave to appeal - unreported - is set out at App. B, pp. App. 32-33.

Jurisdictional Statement

The judgment sought to be reviewed was entered by the Illinois Appellate Court on August 16, 1999. (App. A, p. App. 1) The Order of the Illinois Supreme Court denying petition for leave

to appeal was entered December 1, 1999. (App. B, p. App. 32)

Jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

Constitutional Provisions Involved

The federal constitutional provisions involved are the Confrontation Clause of the Sixth Amendment to the United States Constitution, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Statement of Facts

This case involves testimony from diametrically opposed spheres. Most of the events are undisputed, but one.

Defendant testified sexual intercourse was consensual, while complainant testified it was against her will. (R 1:15-160; 2:303-357) There is no conclusive physical or scientific evidence supportive of either account.

While these areas are generally for the trier of fact, defendant respectfully submits he did not get a fair trial, because of the trial court's refusal to permit defendant to confront his accuser concerning a writing she made prior to the events in question, on

the very day of the events in question.

The writing is a narrative she wrote on May 30, 1991 in her best friend's high school yearbook, making reference to defendant; defendant's automobile; and explicit various sexual innuendos. (R 2:273-77; C 117; verbatim transcribed copy of writing, set out at p. 4, below.)

That date, is the same date complainant either consented to sex, or was assaulted against her will. (R 1:24-26) The narrative writing precedes earlier in the day, the May 30, 1991 encounter between complainant and defendant. (C 117)

Defendant's attorney's efforts to cross-examine complainant about this writing were blocked entirely, by the trial court's repeated sustaining of objections on relevancy and materiality grounds. (R 1:136-147)

After successfully precluding any cross-examination of complainant about her "irrelevant and immaterial" (R 1:144) written narrative, the State was so gracious as to stipulate, in the defendant's case, to the admission of "the contents" of the page. (R 2:273-76, at 274) The page (C 117) reads[1]:

---

[1] Transcribed verbatim, including misspellings, doubleunderline, arrows.

5/30/91 MARGARITA'S PAGE

Yo homet word ↑? Joke about the Ho business. Boy to think no more freshy bullshit Jokes (only sophmore Bullshit Jokes.) We must pinch pennies to Josette ← ha!ha!ha Joke you better call me over the summer and in case ya loose my # here it is (312) 625-6212 ← not that I don't think your gonna not call me
↑
thats makes more sense

To think we made it past twardy Boy he's tough to surpass if ya come to think of it. I heard Mr. Odannavan is teaching sophmore english next year. I hope I have him oh yeah guess what Nick from the beach called me last night he wants to go out with me. So many Guys so little time. I told him I'd get back to him on his offer he's got a nice car its blue has tinted windows (I wonder why) and its a 96 switch it around and you get 69←sick any ways I had big time fun in bio, study and the dances and plan to hang more with you over the summer

K.I.T.
2 D Your Best friend
Q R G
U E I Rita
I A R
IV play C M L
K
Rita Margarita
Migares
[end of C 117]

In this Petition, defendant calls to mind that a stipulation to a cold and unexplained document can never supplant the right to cross-examine.

Precluding defendant's right to cross-examine at bar violated the Confrontation Clause and requires a new trial.

Raising the Federal Question

Defendant raised the federal question presented in his Brief on Appeal in the Appellate Court of Illinois (Appellant's Brief, pp. 1, 15); in his Appellant's Reply Brief (p. 4); and in his Petition for Leave to Appeal to the Illinois Supreme Court (pp. 2, 11).

The Appellate Court did not rule on the federal question squarely presented, but simply affirmed on "relevancy" grounds. (App. A, p. App. 25)

The Appellate Court "agreed" that a stipulation "is not a permissible substitute for the opportunity to engage in an effective cross-examination" (App. A, p. App. 25), but then irrationally concluded: "[h]owever, defendant cannot show the court unreasonably denied his constitutional right to confront his accuser." (App. A, p. App. 25)

The Appellate Court stated, that in the alternative, the error was

"harmless." (App. A, p. App. 27)

Petition for leave to appeal was denied without opinion. (App. B, pp. App. 32-33)

REASONS FOR GRANTING CERTIORARI

1. Certiorari should be allowed to review the judgment below, because defendant was denied his right of confrontation. Permitting a later stipulation to the admission of a document is not a constitutionally permissible substitute for cross-examination.

The Confrontation Clause guarantees a defendant the opportunity to cross-examine the witnesses against him. Pointer v. Texas, 380 U.S. 400, 407 (1965) (Confrontation Clause of 6th Amendment applies to States via Due Process Clause of 14th Amendment).

Cross-examination is the "greatest legal engine ever invented for the discovery of truth." 5 WIGMORE, EVIDENCE § 1367, at 32 (Chadbourn rev. 1974). "[I]n more than one sense it takes the place of torture occupied in the medieval system." Ibid.

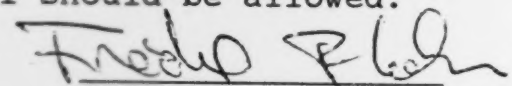
If the yearbook writings were "irrelevant and immaterial" (R 1:136-47) as the prosecution insisted during the cross-examination of complainant, what explanation can there be for the

willingness of the prosecutor to stipulate in defendant's case, that the writings were made by complainant? (R 2:273-76)

Permitting a later stipulation to the admission of a document is not a constitutionally permissible substitute for cross-examination. Face-to-face cross-examination is guaranteed by the Confrontation Clause and Due Process of Law. Coy v. Iowa, 487 U.S. 1012, 1016-17 (1988).

CONCLUSION

For the foregoing reasons, certiorari should be allowed.



FREDERICK F. COHN
Attorney for Petitioner

DENNIS DOHERTY
Of Counsel

APPENDICES

APPENDIX A

FIRST DIVISION
August 16, 1999

No. 1-98-0178

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

NICHOLAS KUHN,
Defendant-Appellant.

) Appeal from the
) Circuit Court of
) Cook County
)
) No. 91 CR 15857
)
) Honorable
) Frank DeBoni,
) Judge Presiding

ORDER

Defendant Nicholas Kuhn and codefendant Philip Rovito were each charged with two counts of aggravated

criminal sexual assault, two counts of attempt aggravated criminal sexual assault, one count of criminal sexual assault, kidnaping, aggravated kidnaping, and unlawful restraint. After separate, but simultaneous bench trials, the trial court found defendants guilty of attempted criminal sexual assault, criminal sexual assault, and unlawful restraint. The trial court found defendants not guilty of aggravated criminal sexual assault and kidnaping charges. The court sentenced defendant Kuhn to eight years for criminal sexual assault and five years for the attempted criminal sexual assault to run concurrent with the unlawful restraint conviction merging. Codefendant *[p. 2]* Rovito, who is not involved in the instant appeal, was sentenced to six years' imprisonment. On appeal, defendant contends that the trial court erroneously limited his cross-examination of the complaining witness regarding an entry that she wrote in her friend's high school yearbook. We affirm.

FACTS

On May 27, 1991, complainant, then 14 years old, went to Oak Street Beach in Chicago with two of her high school friends. Complainant testified that she met defendant at the beach, and the two struck up a conversation, during which complainant told defendant that she was 14 years old. Defendant gave complainant

his pager number and she gave him her home phone number "in hopes to just talk and get in touch and go out on a date."

The next day, complainant paged defendant "to go out." Defendant returned her call, but they did not make plans for that evening. Two days later, on May 30, 1991, complainant paged defendant again. When defendant returned her call, he told her that he had a famous friend with him that day, whom complainant should meet. Although complainant's mother did not normally permit her to go out, her mother was not home, so she agreed to go out with defendant. At about 7:45 p.m., defendant arrived at complainant's home in his car. Complainant testified that defendant drove and his friend sat in the passenger seat. Complainant sat in the front seat with defendant and his friend, whom defendant introduced to complainant as "Luigi" or "Lu" from *[p. 3]* California. Complainant testified that after driving for some time, defendant stopped at a gas station and everyone "switched seats" in the car. Defendant and complainant sat in the back seat while "Luigi" drove. After awhile, defendant and "Luigi" began to converse in Italian. Although complainant did not speak Italian, she spoke Spanish and could understand some of what defendant said to "Luigi." She testified that defendant told "Luigi" that he needed to pick up some keys for work. "Luigi" then drove to an industrial area near several factory buildings and parked the car.

Complainant testified that she began to get a "little bit nervous" at this point.

Next, "Luigi" got out of the car to smoke a cigarette, leaving complainant and defendant alone in the back seat. Complainant and defendant kissed for approximately a minute before the kissing became "more like smothering." She pulled away from defendant, but he put his hands on her inner thigh and shoulder as he told her that "[she] should know what's going on right here." Defendant informed complainant that he was Italian, and had "everything, just like his father." He told complainant that "he always gets what he wants." Complainant became "panicked" but "stayed quiet." "Lu" re-entered the car as defendant informed complainant that he had two baseball bats in the trunk of the car. After defendant and "Lu" assured complainant several times that they would beat her with the bats, complainant got out of the car, fearing for her life. She stated that she took "about three steps" before "Lu" *[p. 4]* grabbed her by the shoulders, defendant grabbed her by her feet, and the two dragged her back inside the car and "shoved" her, face down, into the back seat of the car. Complainant testified that she resisted and began screaming while she kicked and tried to move her arms. She was unable to move freely, however, because "Lu" held her down by her neck and defendant continued to hold her by the feet.

"Lu" then "pinned" complainant down

in the back seat by holding her neck and arms down, while defendant forced her to engage in sexual intercourse. While defendant forced complainant to have intercourse, "Lu" removed her shirt and her bra. Defendant then attempted to force complainant to engage in oral sex, but complainant resisted. "Lu" then gave defendant a box of tissue from the front seat and defendant wiped himself with the tissue. Defendant then exited the car, leaving "Lu" in the front seat and complainant, still naked and "in shock" in the back seat. "Lu" reached over the back seat and tried to grab at complainant. "Lu" then got out of the front seat of the car, went into the back seat and forced complainant to engage in sexual intercourse with him. Afterwards, "Lu" got out of the car and complainant dressed herself. She remained in the back seat alone, while defendant and "Lu" drove her home, saying nothing. Upon arriving at her house, complainant got out of the car, as defendant said to her: "I'll call you tomorrow" and "What? No goodnight kiss?"

Complainant then went into her house, where her brother *[p. 5]* scolded her for going out when she was not allowed to. She testified that she felt very unclean, very shameful, and very "shaken up." She showered, and washed her undergarments. She did not call the police because she knew she had defied her mother's rules.

The next day, complainant went to

school and told the dean of the high school what had happened to her the night before. The police and complainant's mother arrived at the school. Complainant then went to Resurrection Hospital where a doctor and nurse examined her. After talking with police, complainant discovered that the area defendant and "Lu" had driven her to was located in Franklin Park. On June 5, 1991, she identified defendant and "Lu" from a photo array at the Franklin Park police department. While complainant did tell the Franklin Park police that defendant had forced her to have intercourse, she did not tell them that "Lu" had forced her to have intercourse. Complainant testified that she did not come forward with the allegations against "Lu" until April, 1993, because her mother was very disappointed and had told her that she deserved to be raped.

On cross-examination, complainant stated that she initiated contact with defendant by paging him the day after they met at the beach. She acknowledged that she wanted to go on a date with him. She admitted that she suffered no bruising, nor were her clothes ripped or torn in the incident. She further admitted to writing about defendant in her friend's high school yearbook on the day of *[p. 6]* the incident. Defense counsel attempted to cross-examine complainant as to her entry in the yearbook, but the trial court sustained the State's repeated objections to

defense counsel's questioning. Defense counsel attempted to cross-examine complainant as follows:

> "MR. SALERNO (Defense Attorney]: Do you remember talking about Nick in the yearbook?
>
> MS. O'BRIEN [Assistant State's Attorney]: Objection.
>
> THE COURT: Sustained.
>
> MR. SALERNO: Do you remember saying that Nick's car was a '96, which was a `69 backwards?
>
> MS. O'BRIEN: Objection.
>
> THE COURT: Sustained.
>
> MR. SALERNO: Do you remember writing about Nick and talking about foreplay?
>
> MS. O'BRIEN: Objection.
>
> THE COURT: Okay, I'm going to sustain that objection.
>
> MS. O'BRIEN: Thank you.
>
> * * *
>
> MR. SALERNO: But you're making a ruling and you don't know what's in the yearbook.

THE COURT: I'm making a ruling because it's not relevant.

MR. SALERNO: And I would like to make an offer of proof as to what's in the yearbook and why I think it's relevant. *[p. 7]*

THE COURT: Sustained. Move on, Mr. Salerno.

MR. SALERNO: Now when he picked you up, he was in an Oldsmobile `98 or something like that. Do you know what kind of car it was?

WITNESS: It was a blue four-door Cadillac.

MR. SALERNO: Do you remember describing it as a `96?

WITNESS: No. I think it was an `87.

MR. SALERNO: As a `96 car, `69 spelled backward?

MS. O'BRIEN: Objection.

THE COURT: Mr. Salerno, the objection is sustained. This is the second opportunity you have had to try to put something in the record that has no basis in fact, that is irrelevant and immaterial. And I'm objecting to it. Move on and don't

say it again. You got it?

MR. SALERNO: Judge, just for the record...

THE COURT: For the record nothing.

MR. SALERNO: Did you know that [defendant's] car had tinted windows before he came?

WITNESS: I saw it outside, yes.

MR. SALERNO: Did you know what the tinted windows were for?

WITNESS: No, I did not.

MR. SALERNO: Did you ever tell your friend that you *[p. 8]* wondered what the tinted windows were for?

WITNESS: No.

MS. O'BRIEN: Objection.

THE COURT: Overruled. The answer may stand, `No'.

MR. SALERNO: Well, I'll show you what I have marked as defendant's exhibit No. 1 for identification, the yearbook.

MS. O'BRIEN: Judge, I'm going

to object. Number one...

THE COURT: What's the basis of your objection?

MS. O'BRIEN: It's not relevant why the windows were tinted. Why would that be relevant as to whether or not this guy raped her? How is that relevant?

MR. SALERNO: Judge, it's relevant because she writes in the yearbook that...

THE COURT: That doesn't make it relevant, Mr. Salerno. It has to be probative of the issue at hand. How is it probative as to whether or not he had sexual intercourse with a 14-year-old girl against her will? How is it probative?

MR. SALERNO: Judge, if she makes a statement on a prior occasion, `the car windows are tinted, I wonder why they're tinted' there is a meaning to that.

THE COURT: Objection is sustained. That definitely will be sustained. I'm glad you got that on the record because you think there is a meaning to it. Objection is sustained."

Mary Keating testified that in May

1991, she worked as a registered nurse in the emergency room at Resurrection Medical *[p. 9]* Center in Chicago. She spoke with complainant and her mother at the Medical Center on May 31, 1991. Complainant told her that she had been held down, threatened and raped the night before. Keating used a Vitullo Evidence Kit to obtain physical evidence from complainant. Complainant cried continually throughout the entire examination. Keating testified that complainant showed no signs of vaginal abrasions, tears, or bleeding, nor did Keating notice any bruises, marks or abrasions on complainant's body.

Officer Walstad testified that on May 31, 1991, he worked as a detective with the Franklin Park Police Department. On May 31, 1991, Walstad spoke with complainant regarding the previous night's events. She described the offenders as Nick and "Lu" and told him that "Lu" was from Los Angeles. She described defendant's car as "a late `80s model, full size Cadillac" with four doors, tinted windows and a garter belt hanging from the rear view mirror. Complainant and her mother drove with Walstad through the side streets of Franklin Park until complainant recognized the area of the incident. He then called an evidence technician to recover evidence from the location.

Pursuant to the information obtained from complainant, Walstad attempted to locate Nick and "Lu." He called all

airline agencies with flights from Chicago to Los Angeles and also called the Los Angeles police department, but did not locate "Lu." On June 4, 1991, Walstad and his partner, Officer Witz, went to North Riverside Shopping Mall where they noticed a 1985 Oldsmobile with *[p. 10]* dark blue tinted windows and a license plate which read "NICKS 98." The officers noticed a garter belt hanging from the rear view mirror. While Officers Walstad and Witz looked at the car, defendant walked up and introduced himself. After talking to defendant, the officers learned that "Lu" was actually defendant's friend, Philip Rovito. The officers located Rovito at work and spoke with him. The next day, the officers arrested defendant and Rovito. On cross-examination, Walstad stated that he did not notice any baseball bats in defendant's car.

Officer Kemph of the Franklin Park police department testified that in 1991 he worked for the Franklin Park police department as a tactical officer and an evidence technician. On May 31, 1991, Officer Walstad asked him to "process" a possible crime scene in Franklin Park. Kemph described the area as "industrial, a factory area." Kemph collected evidence from the scene, in particular, three tissues found on the ground.

The parties stipulated that Kevin Zeeb, Forensic Scientist with the Illinois State Police Bureau, if called to testify, would state that he examined

the Vitullo Evidence Kit used to retrieve physical evidence from complainant. The vaginal swabs contained seminal material which could have originated from defendant or from a combination of defendant and codefendant Rovito. He also examined the tissues collected from the crime scene and found trace amounts of seminal material present on several of the tissues as well. No male could be excluded as the originator of the material *[p. 11]* found on the tissue.

At the close of the State's case-in-chief, the court granted a directed finding of not guilty in favor of defendant on count II which charged defendant with aggravated criminal sexual assault during the commission of the felony of kidnapping. The motion for directed finding as to the other counts was denied.

Defendant testified in his own defense. Defendant testified that in May, 1991, he was 19 years old. On May 27, 1991, complainant approached him and his friends at Oak Street Beach, while they played volleyball. They talked, and complainant suggested that the two "go out and do something some day." He gave her his pager number, and she gave him her home telephone number. As they talked, one of defendant's friends came up and pulled defendant's shorts down. Complainant teased defendant about his friend's behavior and suggested that maybe she would like to see him naked. Defendant then leaned over to give

complainant a kiss on the cheek, but, according to him, "she moved, and we kissed on the mouth." Shortly thereafter, defendant and his friends left the beach for the day.

Complainant paged defendant the next day and asked if he could go out with her that night. He told her he would call her back later, but never did. He testified that she paged him again the next day, but again, he did not return her call. She continued to page him over the course of the next few days. On May 30, 1991, while in route to visit his friend Phil Rovito at work, complainant *[p. 11]* paged defendant again. When he arrived at the restaurant where Rovito worked, he returned her call. When complainant asked defendant when they were going to go out together, he told her that he was with his friend Phil that night. Complainant told defendant that she did not mind if Phil came along and told defendant, "she didn't mind two guys." According to defendant, he inferred from complainant's statement that she was "a girl that had sex with two guys."

Defendant and Rovito then drove to a shopping mall to pick out gifts for their girlfriends, and then drove to complainant's house. Complainant sat with defendant and Rovito in the front seat of defendant's car. After driving to a nearby gas station, complainant asked defendant if he would go into the back seat with her. He agreed, and the two kissed in the back seat while Rovito

continued driving. Complainant wore a T-shirt that said "2-Quick Rita" on it. When defendant asked her what "2-Quick Rita" meant, she told him that she was "quick at what she wants." Defendant asked complainant what she wanted to do, to which she replied, "I'm not wearing any panties. So you take that the way you want to take it." At that point, defendant asked Rovito to pull over and he pulled the car into an area near an auto body shop. Defendant testified that he and complainant then engaged in consensual sexual intercourse in the back seat of the car.

After the two had intercourse, complainant did not put her clothes back on, but instead said to defendant, "What about your *[p. 13]* friend?" Defendant then exited the car and asked Rovito if he wanted to have sex with complainant also. Rovito then went into the back seat with complainant. After "a couple" minutes passed, defendant stated that the car door opened, so he joined them in the car. Defendant testified that he sat in the driver's seat, Rovito sat in the passenger's seat, and complainant stayed in the back seat. As he drove complainant home, she said, "I got something to tell you guys but you're going to be mad" and "If I tell you, you're not going to call me tomorrow." After defendant assured her that they were all friends, complainant said "Nick was cuter, but Gigi was better." Defendant testified that "Gigi" is Rovito's family nickname. When they

arrived at complainant's house, she kissed them both and asked defendant to call her the next day. He also testified that he does not speak Italian and he never told complainant that Rovito was from California.

On cross-examination, defendant stated that while driving with Rovito to meet complainant, he told Rovito that "the way she talks and the way she's been calling me and stuff like that, that she's a girl that wants to have sex." Defendant admitted that when the police approached him at North Riverside Mall on June 4, 1991, he lied about his whereabouts on the night of May 30. He told the officers that he worked until 10 p.m. that night and then went to his girlfriend's house. He stated that he did not admit to being with complainant because his girlfriend was with him while the police were questioning him. He admitted, however, that his *[p. 14]* girlfriend was not with him during the entire questioning.

The next day, defendant voluntarily went to the Franklin Park police department to tell Officer Walstad that he had lied to him the day before. However, during this conversation, defendant told Officer Walstad that he and Rovito picked up complainant in his car, drove and talked for awhile, and then took her home. He did not tell the officer that either he or Rovito had sexual intercourse with her. He did not tell the officer that he kissed

complainant or that he went into the back seat of the car with her. In fact, he specifically told the officer that only he drove his car that night. He denied introducing Rovito as "Lu" or "Luigi." He denied threatening complainant with baseball bats and further testified that she never tried to get out of the car.

Defendant's mother, Patricia Kuhn, testified that defendant had not seen his father since 1980, when he was nine years old. She stated that she does not speak Italian, nor does anyone in the family home speak Italian. To her knowledge, defendant never took Italian lessons, nor does he speak Italian.

Finally, during the defense case-in-chief, the court permitted the parties to stipulate to the contents of complainant's entry in her girlfriend's high school yearbook. Defense counsel read the contents into the record, and the court admitted a copy of the yearbook page into evidence.

After closing arguments by both sides, the trial court found defendants guilty of attempted criminal sexual assault, criminal *[p. 15]* sexual assault, and unlawful restraint. Defendant now appeals his conviction.

ANALYSIS

Defendant contends that the trial court erroneously limited his cross-examination of the complaining witness regarding her hand-written entry in her

friend's high school yearbook. Defendant asserts that the trial court prevented his efforts to cross-examine complainant regarding her writings by repeatedly sustaining the State's objections to his questioning. Defendant argues that the trial court prohibited him from exercising his constitutional right to confront his accuser and unreasonably hindered the presentation of his defense.

The confrontation clause of the United States Constitution guarantees the right of a criminal defendant to confront the witnesses against him. U.S.C.A. Const. Amends. 6, 14. People v. MacFarland, 228 Ill. App. 3d 107, 592 N.E.2d 471 (1992) . Criminal defendants generally exercise this right by cross-examining adverse witnesses at trial. People v. Puente, 125 Ill. App. 3d 152, 465 N.E.2d 682 (1984). A defendant may cross-examine a witness on any matter that may demonstrate bias against the defendant, interest in the proceeding or a potential motive to provide false testimony. People v. Frampton, 248 Ill. App. 3d 238, 618 N.E.2d 541 (1993).

Although any limitation on the right to cross-examine requires scrutiny, a defendant's rights under the confrontation clause are not absolute. People v. Jones, 156 Ill.2d 225, 61 N.E.2d 325 *[p. 16]* (1993). The confrontation clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to

whatever extent the defense desires. Delaware v. Fensterer, 474 U.S. 15, 20, 88 L. Ed. 2d 15, 19, 106 S. Ct. 292, 294 (1985). The trial court retains wide latitude to impose reasonable limits on cross-examination of a witness if further inquiry might lead to harassment of the witness or prejudice to the defendant. Frampton, 248 Ill. App. 3d at 244. An interrogation that is of minimal relevance or that is unduly repetitive may be restricted by the court. Frampton, 248 Ill. App. 3d at 244.

Although a defendant has a constitutional right to present his theory of the defense, a trial court may exercise its discretion to limit cross-examination once it has allowed sufficient cross-examination of a witness to satisfy the constitutional guarantee. Davis v. Alaska, 415 U.S. 308, 316, 39 L. Ed. 2d 347, 353-54, 94 S. Ct. 1105, 1110 (1974). The reviewing court bears in mind that this constitutional guarantee does not provide the defense with unlimited authority to attack the credibility of a witness. Rather, the confrontation must be both relevant and based upon a showing of bias, prejudice or motive. People v. Sandoval, 135 Ill. 2d 159, 552 N.E.2d 726 (1990). On review, the court analyzes the preservation of this right in terms of what the defendant was allowed to accomplish at trial, rather than what the lower court prohibited the defendant from doing. People v. Baugh, 96 Ill. App. *[p. 17]* 3d 946, 422 N.E.2d 166 (1981).

Whether a denial of cross-examination violated a defendant's right of confrontation should be determined by whether the trier of fact "has been made aware of adequate factors to determine whether the witness is worthy of belief, not whether any particular limitation has been placed upon defendant's ability to cross-examine a witness." People v. Hines, 94 Ill. App. 3d 1041, 1048, 419 N.E.2d 420 (1981).

Defendant first argues that the trial court erroneously concluded that the hand-written notes complainant wrote in her friend's yearbook were irrelevant to his theory of the defense. Defendant claims that the notes complainant addressed to her friend prior to going out with defendant are relevant and material to his claim that complainant consented to sexual intercourse.

Evidence is relevant if it has any tendency to make the existence of any consequential fact, more or less probable than it would be without the evidence. People v. Kirnbrough, 138 Ill. App. 3d 481, 485 N.E.2d 1292 (1985) . Before evidence of any kind is admissible, it must be relevant. Kimbrough, 138 Ill. App. 3d at 486. A judge retains wide latitude to impose reasonable limits on cross-examination. Delaware v. Van Asdall, 475 U.S. 673, 679, 89 L.Ed.2d 674, 683, 106 S. Ct. 1431, 1435 (1986). The latitude permitted on cross-examination is a matter within the discretion of the trial court, and a

reviewing court will not interfere unless there has been a clear abuse of discretion resulting in manifest prejudice to the defendant. People v. Kitchen, 159 Ill. 2d 1, 636 *[p. 18]* N.E.2d 433 (1994).

In this case, defendant fails to demonstrate how complainant's written communication to her high school friend is relevant to defendant's affirmative defense of consensual intercourse. First, it is undisputed that complainant made the yearbook entry at least several hours before going out with defendant that evening. Any comments that complainant may have made regarding defendant hours before meeting him that night cannot fairly indicate whether complainant consented to sexual intercourse with defendant several hours later. Moreover, defendant sought to cross-examine complainant about the yearbook entry in an effort to establish complainant's willingness to go out with defendant that night. However, complainant plainly admitted this fact several times throughout her testimony.

Defendant notes that in her entry to her best friend's yearbook, complainant wrote the following about defendant: "He's got a nice car...it's blue...has tinted windows (I wonder why)." Defendant claims that this passage indicates complainant's understanding and knowledge that defendant routinely engaged in consensual sexual activity in his car.

We disagree with defendant that this

is the "painfully obvious" message that complainant meant to convey to her best friend by writing this passage. However, were that the case, it is nonetheless irrelevant to a determination of whether defendant forced complainant to engage in sexual intercourse against her *[p. 19]* will. Complainant's belief that defendant had previously engaged in consensual sexual activity in his car does not translate into willingness on the part of complainant to do the same. Complainant's implication that defendant had previously engaged in sexual intercourse in his car does not raise any inference that complainant consented to intercourse by voluntarily entering the car. Regardless of whether or not complainant regarded defendant's car as an "apparent sex lair," she retained the right to decline defendant's advances at any time. Therefore, complainant's observation regarding defendant's car is not probative of the issue of whether she consented to sexual intercourse on this particular occasion.

Defendant claims that the trial court should have allowed extended inquiry into how complainant learned that defendant had a blue car, or that the car had tinted windows. Defendant now claims that complainant's testimony that she saw defendant's blue car outside the house when he came to pick her up "cannot tell the whole story." Defendant asserts that perhaps complainant followed defendant to his car after he left Oak Street Beach on

the day they met for the first time.

We note, however, that defense counsel at trial did not pursue this line of questioning although the court permitted counsel to do so. Defense counsel was allowed to ask whether complainant knew the car had tinted windows, and the court allowed complainant to respond. Defense counsel also asked several other questions *[p. 20]* regarding the tinted car windows. Although defendant now claims that complainant's responses were incomplete, the record shows that defense counsel had the opportunity to clarify or explore those answers at trial. Defendant theorizes that complainant may have followed him from the beach, yet defendant failed to further explore this theory at trial. As a result, he cannot now claim that the trial court prevented this inquiry.

Defendant further argues that the trial court erroneously prevented his cross-examination of the complainant regarding several sexual innuendoes she wrote in her friend's yearbook. The record reflects that complainant described defendant's car as a "`96." Complainant also wrote: "Turn it around and you get `69. Sick." Additionally, complainant made a small notation that read "IV play" (foreplay] in the margin of the yearbook entry. Defendant claims that cross-examination as to these notations should have been allowed in order to determine whether these notes

had any connection to defendant and the events that transpired.

Again, we fail to see the relevance of these comments to the issue of whether complainant consented to sexual intercourse with defendant on the night in question several hours after the comments were written. Complainant's familiarity with sexual innuendo, including oral sex and foreplay, cannot be construed as consent to sexual intercourse. Complainant's willingness to discuss or write about sexual matters with her girlfriend makes it neither more or less probable that she consented to sexual intercourse with *[p. 21]* defendant.

Defendant cites to People v. Halcomb, 176 Ill. App. 3d 100, 530 N.E.2d 1074 (1988) to support his assertion that evidence corroborative of a theory of consent is admissible in sexual assault cases. However, Halcomb is dissimilar to the present case. In Halcomb, the trial court excluded evidence of a private conversation between the complainant and the defendant which took place immediately prior to the alleged sexual assault. During the course of the conversation, the complainant revealed that she had recently had an abortion. This court overturned the lower court's use of the rape shield statute to preclude the admission of the conversation, because the sensitive nature of the conversation tended to corroborate the defendant's claim that

the complainant consented to intercourse. Halcomb, 176 Ill. App. 3d at 108.

In this case, as in Halcomb, the theory of the defense is that complainant consented to sexual intercourse with defendant. Here, however, defendant seeks to introduce writings of a personal nature that complainant addressed not to defendant, but rather to her friend. As the State correctly notes, the intimate conversation between the complainant and the defendant in Halcomb, is not analogous to the incidental comments complainant wrote to her girlfriend about defendant in this case. Complainant's suggestive remarks to her friend do not indicate any degree of intimacy between her and defendant. Furthermore, complainant's comments were not only written hours before their encounter, but were *[p. 22]* written before complainant knew she would be seeing defendant that evening. The comments therefore make it neither more or less probable that she consented to sexual intercourse with defendant. The record supports the trial court's relevancy ruling limiting defense counsel's cross-examination.

We agree with defendant that the State's stipulation in the defense case to the yearbook entry is not a constitutionally permissible substitute for the opportunity to engage in an effective cross-examination. However, defendant cannot show that the court unreasonably denied his constitutional right to confront his accuser. A

determination of whether a trial court properly preserved a defendant's right to present his theory of the defense is examined in light of what the trial court allowed the defendant to accomplish rather than what the defendant was prohibited from doing. See People v. Hines, 94 Ill. App. 3d 1041, 419 N.E.2d 420 (1981).

In this case, complainant testified that she voluntarily exchanged phone numbers with defendant, and initiated further contact with defendant by paging him the next day. She admitted that she wanted to date defendant, and that she paged him on four separate occasions before they finally made plans to see one another. Complainant testified that when complainant and Rovito drove up to her home, she willingly sat in the front seat with both of them. Then she voluntarily went into the back seat alone with defendant, and kissed him. Complainant conceded that she pursued *[p. 23]* defendant and voluntarily went out alone with him and his friend although her mother did not give her permission to do so. Defendant had the opportunity to cross-examine complainant regarding her pursuit of defendant, her familiarity with the outer appearance of defendant's car, and the absence of physical injury to her person. Defendant had the opportunity to question complainant regarding her failure to allege that codefendant Rovito assaulted her until nearly two years after the incident.

Furthermore, defendant demonstrated that complainant willingly engaged in physical contact with him by voluntarily kissing him in the back seat of the car. Defendant was permitted to expound upon sufficient relevant details to fully present his theory of the defense.

As a result, we find that the trial court satisfied the constitutional guarantee of defendant's right to confront his accuser. Based on the totality of the circumstances, the trier of fact was made aware of adequate factors necessary to determine whether complainant was worthy of belief. People v. Maldonado, 193 Ill.App.3d 1062, 1069, 550 N.E.2d 1011 (1989). In conclusion, defendant cannot demonstrate that the trial court abused its discretion resulting in manifest prejudice to the defendant by prohibiting defendant from cross-examining complainant regarding an entry she made in her friends's yearbook.

Assuming *arguendo* that the trial court erred in precluding further cross-examination as to the yearbook entry, the error was *[p. 24]* harmless. At trial, defense counsel cross-examined the complainant extensively. Complainant admitted she wanted to go out with defendant, that she like him, she paged him and that she kissed him. In addition to the testimony presented, the trial court, the trier of fact in this case, also examined and considered the yearbook entry in its entirety, as it was admitted into evidence in defendant's case-in-

chief. Thus, we believe the trial court was made well aware of adequate factors to determine issues of credibility. The trial court heard the witnesses' testimony, observed their demeanor and reviewed the evidence, including the yearbook entry, and nonetheless, resolved the credibility issues in favor of the State. In so finding, the court stated:

> "This court finds the victim's testimony to be credible, believable. I find her to be more believable witness. There's no comparison between believability and credibility between witnesses who testified in this case. This is a case of believability. This is a case of credibility. Credibility lies heavily, heavily with the victim in this case. It's not even a close question regarding the believability to believe and the credibility of the witnesses. This Court does not believe the defendants in this case."

Here, as in any bench trial, the trial judge resolved the conflicts in the evidence presented. People v. Sowewimo, 270 Ill. App. 3d 330, 657 N.E.2d 1047 (1995). There is a strong presumption that a finding of a trier of fact regarding credibility is sound. People v. Silas, 185 Ill. App. 3d 920, 933, 541 N.E.2d 1239 (1989). A court of review should not second guess the trier of

fact's evaluation of the credibility of the witnesses, the weight to be given their testimony, and the inferences to be drawn from the *[p. 25]* evidence. People v. Murray, 194 Ill. App. 3d 653, 551 N.E.2d 283 (1990).

The record reflects that the trial court relied on the credibility of the witnesses in reaching its decision. The court specifically stated that it had resolved the credibility issues in favor of the State, and that there was "no comparison" between the witnesses' testimony at trial. We also note that at the close of the case, the trial court found defendant not guilty of aggravated criminal sexual assault and kidnapping charges. The court found defendant guilty of attempted criminal sexual assault, criminal sexual assault, and unlawful restraint. The record reflects that the trial court relied on the evidence and the testimony presented in reaching its well reasoned decision. We further find no indication that defense counsel's discussion of the lesser offense in closing argument improperly influenced the court's decision.

In conclusion, defendant has failed to demonstrate that the trial court abused its discretion in limiting defendant's cross-examination of complainant, or in reaching its ultimate decision. For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Affirmed.

O'MARA FROSSARD, J., with TULLY, J., concurring.

GALLAGHER, J., specially concurring.

[p. 26]
JUSTICE GALLAGHER, specially concurring.

I write to concur specially in the majority's decision. I believe that the trial court erred in refusing defendant's counsel's right to cross-examine the victim regarding her written notation in a friend's yearbook. The notations were made only hours before the victim and defendant met and engaged in sexual conduct. Clearly, the victim's knowledge and state of mind were relevant to whether she consented to a sexual act with defendant. The trial court was in error in deciding otherwise.

Moreover, the State argued subsequently that its objections were based upon the form of the questions asked as improper impeachment, not on relevance. Therefore there was a miscommunication during the trial, which points up the oft-expressed importance of seeking a basis for an objection, rather than merely allowing counsel to make vague, nonspecific objections.

However, after a thorough review of the record, it is my view that the error of the trial court was harmless beyond a reasonable doubt. This is so not only because the document in question was admitted, but also because questions were asked and answered during cross-

examination of the victim regarding the tinted windows. That left only two areas of inquiry unanswered relating to the phrase "IV play" and the reference to "69." Nevertheless, it was amply demonstrated by counsel for defendant that the victim was the aggressor in trying to arrange a meeting with defendant. She paged him several times, teasingly called him names when he expressed *[p. 27]* reluctance to meet her, and she willingly went into the backseat of his car and engaged in kissing. No doubt she did these acts voluntarily. Counsel very effectively made that point during cross-examination. Defendant was not deprived of his right to confront his accuser.

Nevertheless, the voluntary nature of that conduct does not equate with consent to sexual intercourse. Therefore, the victim's demeanor and her testimony as well as defendant's were crucial in determining this key issue. The able trial judge heard the testimony and observed the witnesses. He very clearly stated on the record that he found the victim to be more credible. We should not disturb that determination absent good cause in the record. My review has yielded none. For these reasons, I concur in affirming defendant's conviction.

APPENDIX B

STATE OF ILLINOIS
SUPREME COURT

[dated December 1, 1999]

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eighth day of November, 1999.

Present:
Charles E. Freeman, Chief Justice
Justice Benjamin K. Miller
Justice James D. Heiple
Justice Mary Ann G. McMorrow
Justice Michael A. Bilandic
Justice Moses W. Harrison II
Justice S. Louis Rathje

On the first day of December, 1999, the Supreme Court entered the following judgment:

No. 88272

People State of Illinois, Respondent	Petition for Leave to Appeal from Appellate Court First District
v.	1-98-0178
Nicholas Kuhn, Petitioner	91CR15857

The Court having considered the Petition

for leave to appeal and being fully advised of the premises, the Petition for leave to appeal is DENIED.

As Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, I certify that the foregoing is a true copy of the final order entered in this case.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court, this twenty-third day of December, 1999.

[signed:] Juleann Hornyak
Clerk,
Supreme Court of the
State of Illinois